

Radcliffe
Chambers

Interfering with easements

Matthew Mills

1st October 2021



Our topics

1. What amounts to an interference in general?
2. Interference with specific easements
3. Remedies

1. Interference in general

The cause of action

- Private nuisance: Paine & Co Ltd v St Neots Gas and Coke Co Ltd [1939] 3 All ER 812
- Not trespass because the dominant owner does not possess the servient land
- Successors in title can be liable if they 'adopt' the interference: e.g. Saint v Jenner [1973] Ch 275

The basic test

"Not every interference with an easement, such as a right of way, is actionable. There must be a substantial interference with the enjoyment of it."

-- West v Sharp (2000) 79 P&CR 327, at 332 per
Mummery LJ

The basic test: more detail

- *B&Q plc v Liverpool and Lancashire Properties Ltd* [\[2000\] EWHC 463 \(Ch\)](#), at [45]-[48] per Blackburne J:
 1. The test is not whether C is left with 'reasonable' use of his easement
 2. Unless C's views are unreasonable or perverse, D cannot argue that other people would not complain
 3. D cannot deprive C of an extensive right just because C still has other reasonable rights
 4. In summary, the test is one of convenience not necessity or reasonable necessity

A useful (old) quote

"The question is, whether practically and substantially the [easement] can be exercised as conveniently as before, or whether the defendant has really lost anything by the alteration made by the former owner and continued by the plaintiff? If you think that for all practical and useful purposes the way is the same as before, find for the plaintiff, if you think otherwise, find for the defendant."

-- Hutton v Hamboro (1860) 2 F & F 218, at 219 per
Cockburn CJ

2. Interference with particular easements

Rights of way

"The question whether any particular interruption amounts to an unlawful interference depends upon the nature of the right of way and of the place, and upon the general circumstances of the case."

-- Halsbury's Laws of England (volume 87, Real Property, 2017), paragraph 897

Rights of way: general

1. An occasional interference: CP Holdings Ltd v Dugdale [1998] NPC 97
2. Narrowing the route of a right of way: Zieleniewski v Scheyd [2012] EWCA Civ 247
3. Constructing a low tunnel over the route: VT Engineering Ltd v Richard Barland & Co Ltd (1968) 19 P&CR 890
4. Altering the route of the right of way without express permission: Greenwich Healthcare NHS Trust v London and Quadrant Housing Trust [1998] 1 WLR 1749
5. Interference does not need to occur on the route: Waterman v Boyle [2009] EWCA Civ 115, at [20]
6. Defendant's motive is relevant: Owers v Bailey [2007] 1 P&CR DG17

Rights of way: gates & locks

1. A lock or gate is not necessarily a substantial interference:
 - a) The route does not need to be free from *any* obstructions:
Pettey v Parsons [1914] 2 Ch 662
 - b) The servient owner has a right to security: Collins v Slade
(1874) 23 WR 199
2. Giving a key does not always stop there being an interference:
Page v Convoy Investments [2017] EWCA Civ 1061
3. Courts can make pragmatic orders:
 - a) Gate must stay open during working hours: Pettey
 - b) Touch-activated gate preferable to fob-controlled gate:
Kingsgate Development Projects Ltd v Jordan [2017] EWHC 343 (TCC)
 - c) More than one gate = more likely to be an interference:
Siggery v Bell [2007] EWHC 2167 (Ch)

Parking easements

1. Requiring C to park elsewhere was an interference: Stonebridge v Bygrave [2001] All ER (D) 376 (Oct)
2. D could not build over C's parking space even if C was offered an alternative space: Kettel v Bloomfold Ltd [2012] EWHC 1422 (Ch)
3. Attempting to give parking directions to C's customers was an interference: Leon Asper Amusements Ltd v Northmain Carwash (1966) 56 DLR (2d) 173

Rights to light

"In order to give a right of action, and sustain the issue, there must be a substantial privation of light, sufficient to render the occupation of the house uncomfortable, and to prevent the plaintiff from carrying on his accustomed business... on the premises as beneficially as he had formerly done"

-- *Colls v Home and Colonial Stores* [1904] AC 179,
at 204 per Lord Davey

Rights to light

1. Is the light enough for all the ordinary purposes for which the dominant property might be used: Colls v Home and Colonial Stores [1904] AC 179
2. The fact the dominant owner habitually uses artificial light is immaterial: Midtown Ltd v City of London Real Property Co Ltd [2005] EWHC 33 (Ch)
3. There is no '45 degrees of light' rule: Colls
4. In practice, in most cases you should instruct a light expert: Midtown, at [51] per Peter Smith J

Watercourses

1. Polluting the water in the watercourse: Aldred's Case (1610) 9 Co Rep 57, at 59a
2. Diverting a river: Bower v Hill (1835) 1 Bing NC 549
3. Siphoning off water from a pipe: Moore v Browne (1572) Dyer 319b, pl 17
4. Connecting another drain to the dominant owner's pipe: Lee v Stevenson (1858) EB&E 512
5. Preventing the dominant owner from drawing water from a spring: *Gale on the Law of Easements* (20th ed, 2020), paragraph 13-04

Rights to support

1. Interference = removing the support in a way that causes a change in the dominant land: AG v Conduit Colliery Co [1895] 1 QB 301, at 311 per Collins J
2. No interference if one mode of support is substituted for another: Bower v Peate (1876) 1 QBD 321, at 325 per Cockburn CJ

3. Remedies

Remedies: general

1. Remedies apply to express, implied and prescriptive easements: Chollocombe v Tucker (1614) 1 Roll Abr 109
2. A dominant owner can claim more than one remedy: Leeds Industrial Co-operative Society Ltd v Slack [1924] AC 851
3. Anyone who is entitled to possession of the dominant land may issue a claim: Hunter v Canary Wharf Ltd [1997] AC 655
4. A person with a reversionary interest can only issue a claim if there has been a permanent interference with the easement: Baxter v Taylor (1832) 4 B & Ad 72
5. Generally, it is sensible to join the occupiers of both plots of land

Abatement

- Ancient common law right to enter onto another's land and take reasonable steps to end an interference
 1. Can only be used "*in clear and simple cases, or in an emergency*": Burton v Winters [1993] 1 WLR 1077
 2. C should give D notice of their intention to abate, unless the interference is on C's land (e.g. overhanging branches): Lemmon v Webb [1895] AC 1
 3. C must do no more than practically necessary to abate: Hill v Cock (1872) 26 LT 185
 4. The burden is on C to show they acted lawfully: Lagan Navigation Co v Lambeg Bleaching, Dyeing and Finishing Co [1927] AC 226

Deviation

- Servient owner can (only) deviate the route if the original grant gave them an express right to do so: Heslop v Bishton [2009] EWHC 607 (Ch), at [21]-[25] per HHJ Cooke
- If the servient owner blocks the route, the dominant owner can deviate around the obstruction: Selby v Nettleford (1873-74) Lr 9 Ch App 111, at 114 per Lord Selborne LC

Declarations

- An order of the court recording a decision on an issue of fact or law
- Can be used by dominant owner where servient owner has not *yet* interfered with the easement
- Can be used by the servient owner to prove that a proposed action (e.g. development) would not be an interference
- Declarations bind both sides' successors in title
- But it is not contempt of court to ignore a declaration; the party seeking to enforce it must apply for an injunction

Declarations

- Brent LBC v Malvern Mews Tenants Association Ltd [2020] EWHC 1024 (Ch), at [13] per Miles J:
 1. The power to award a declaration is discretionary
 2. There must be a 'real and present dispute' between the parties (i.e. each party must be affected by the result)
 3. The overarching aim is to do justice between the parties
 4. All sides of the argument must be fully and properly put
 5. A declaration must be the most effective way of resolving the issue
- A dominant owner can claim a declaration whether or not they ask for another remedy: rule 40.20 CPR
- Make sure the terms of the declaration are clear: cf Dicker v Scammell [2005] EWCA Civ 405

Injunctions

- An order requiring someone to do or not do something
- Only binding on the parties to the dispute
- Breach of an injunction is contempt of court
- Key questions (*Snell's Equity* (34th ed, 2020), chapter 18):
 1. Is there a risk D will interfere again in future?
 2. Would damages be an adequate remedy?
 3. Did C unduly delay in apply for the injunction, and has this prejudiced D?
 4. Has either party acted particularly poorly?

Interim injunctions

- Deciding whether to apply for an interim injunction:
 1. Will something irrevocable happen if C does not apply for an interim injunction (e.g. construction work)?
 2. How inconvenient would it be for C to wait until trial to obtain a remedy?
 3. How inconvenient would it be for D to comply with an interim injunction (which may be revoked) until trial?
 4. How much extra work and cost would be involved at an early stage?
 5. How likely is D to capitulate if C obtains an interim injunction?
 6. Can C afford to give an undertaking in damages?

Damages

- Two separate issues:
 1. Damages for private nuisance
 2. Damages in lieu of an injunction

Damages for nuisance

- Calculated on the standard tort basis (i.e. C is awarded compensation for the loss which they have actually suffered)
- C can claim (modest) damages for loss of amenity: Carr-Saunders v Dick McNeill Associates Ltd [1986] 1 WLR 922
- C can claim financial loss:
 1. Loss of profits (e.g. commercial premises): Hunte v E Bottomley & Sons Ltd [2007] EWCA Civ 1168
 2. Diminution in value (if the interference is permanent): Snell & Prideaux v Dutton Mirrors [1995] 1 EGLR 259
- C can (exceptionally) claim aggravated damages: Owers v Bailey [2007] 1 P&CR DG17

Damages in lieu of an injunction

- A L Smith LJ set down a “*good working rule*” in *Shelfer v City of London Electric Lighting Co* [1895] 1 Ch 287
- Supreme Court has said that the court should weigh up all competing factors and exercise its discretion: *Coventry v Lawrence* [2014] UKSC 13
- But lower courts still consider the *Shelfer* principles: e.g. *Ottercroft v Skandia Care Ltd* [2016] EWCA Civ 867
- When deciding quantum, the court will apply the 12 principles set out by Lord Reed in *One Step (Support) Ltd v Morris-Garner* [2018] UKSC 20, at [95]



Radcliffe Chambers

Matthew Mills

Radcliffe Chambers
11 New Square
Lincoln's Inn
London
WC2A 3QB

T: 020 7831 0081

F: 020 7405 2560

DX: 319 London

clerks@radcliffechambers.com

www.radcliffechambers.com